

Issue: Group III Written Notice with Suspension (use of excessive force); Hearing Date: 05/30/18; Decision Issued: 06/30/18; Agency: VSP; AHO: Ternon Galloway Lee, Esq.; Case No. 11173; Outcome: No Relief – Agency Upheld; **Administrative Review: Ruling Request received 07/05/18; EEDR Ruling No. 2019-4757 issued 07/27/18; Outcome: AHO's decision affirmed; Judicial Review: Appealed to Hampton Circuit Court; Outcome pending.**

DECISION OF HEARING OFFICER

In the matter of

Case Number: 11173

Hearing Date: May 30, 2018

Decision Issued: June 30, 2018

SUMMARY OF DECISION

The Agency had found Grievant engaged in misconduct by using excessive force during an arrest. The Agency then issued Grievant a Group III Written Notice with 10 days suspension. The Hearing Officer determined the Agency has met its burden, the discipline was consistent with policy and law, and it was reasonable. Hence, the Hearing Officer has upheld the Agency's discipline.

HISTORY

On January 5, 2018, the Agency issued Grievant a Group III Written Notice with 10 days suspension for using excessive force during an arrest. Grievant timely filed his grievance to challenge the Agency's action. Thereafter, on March 9, 2018, the Office of Equal Employment and Dispute Resolution ("EEDR") assigned the undersigned as the hearing officer to this appeal. The Hearing Officer held a pre-hearing conference ("PHC") on March 29, 2018,¹ and subsequently issued a scheduling order which, among other particulars, set the hearing for May 30, 2018.²

Prior to commencing the hearing on May 30, 2018, the Hearing Officer provided the parties an opportunity to present matters of concern. The Hearing Officer then answered questions concerning the proposed exhibits.

Prior to taking testimony, the Hearing Officer admitted the parties' joint exhibits without objection. They included two binders consisting of Joint (J) Exhibits 1 through 35.

Further, each party was given the opportunity to make an opening and closing statement and to cross examine any witness presented by the opposing party.

During the proceeding, the Agency was represented by its advocate. Grievant was represented by his attorney.

APPEARANCES

Advocate for Agency

Witnesses for the Agency (6 witnesses)

Grievant

Witnesses for Grievant (4 witnesses)

¹ This was the first date available for the parties.

² The parties agreed to this date.

Joint Witness (3)

ISSUE

Was the written notice warranted and appropriate under the circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) §5.8(2). A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM §9.

FINDINGS OF FACT

After reviewing all the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The incident leading to the Group Notice:

1. Grievant is a state trooper and has worked as such for about 18 years.
2. Grievant is a Defensive Tactics Instructor. Thus, he is trained and adept in using defensive tactics to effectuate an arrest. Moreover, when the relevant incident occurred, Grievant possessed the training to employ more wide ranging defensive tactics when effectuating an arrest than a sworn officer (officer) who has only basic training in employing defense tactics. This includes tactics used to arrest subjects that are either cooperative or non-cooperative. (Testimonies of Deputy Superintendent and Division Commander I).
3. On the morning of February 6, 2017, Grievant was travelling east bound on interstate 64. Traffic was congested and moving very slowly. Grievant observed a vehicle several car lengths in front of him drive on the right shoulder and then pull back in front of traffic in the travel lane. Driving on the shoulder is a traffic infraction. Grievant immediately activated his siren and proceeded to cause the driver to stop due to the traffic infraction. Within about 15 – 20 seconds of Grievant activating his siren and pursuing the driver, the driver put on his right signal light, pulled over to the right shoulder, and stopped his vehicle. The shoulder lane was paved and only a few feet from the travel lane and moving traffic. Driver remained inside his vehicle. Upon Driver stopping, within a few seconds, Grievant parked his patrol car immediately behind Driver’s vehicle, exited his patrol car, and rapidly approached the Driver’s vehicle on the driver side. As Grievant is approaching the vehicle, the driver appears to throw an item in the back seat. Upon Grievant’s arrival to the vehicle, the driver’s window was down. Grievant leaned in the window. (J Exh. 32).
4. Grievant reported on the criminal complaint that as he approached the vehicle he observed Driver lean over twice to the back and place a jacket on the back seat. Grievant

described these movements as “furtive.” (J Exh. 10 at 1 – 3). Grievant concluded that due to these movements as he approached the vehicle and the smell of marijuana he had authority to proceed with an investigative detention.³

5. The Hearing Officer viewed the video several times. She observed only one movement suggesting an item was thrown to the back seating area.

6. The Hearing Officer could also adequately observe on the video that after Grievant approached the vehicle, approximately, 12 seconds passed. During this time, Driver could be seen moving his right hand twice. At the end of the 12 seconds, Grievant opened the driver’s car door and forcibly removed Driver from his vehicle. (J Exh. 32).

7. Grievant reported on the criminal complaint that he completed on the same day of the incident that before removing Driver from the vehicle, he had smelled marijuana as he approached the vehicle. Grievant stated that he asked Driver if he had any weapons and told Driver that Grievant smelled marijuana. He asked Driver why Driver was reaching to the back seat. Also Grievant stated that while at the driver’s window, Grievant instructed Driver to place his hands on the steering wheel several times and driver would not comply. Grievant stated that at that point he instructed Driver to get out of the vehicle and face forward so Grievant could hand cuff the driver. (J Exh. 10 at 1-3).

8. As there was no sound recording of the incident, the Hearing Officer was unable to confirm Grievant’s statements regarding any conversation that took place after Grievant arrived at Driver’s window. (J Exh. 32).

9. After Grievant opened the vehicle door, within seven (7) seconds, Grievant forcibly removed Driver from the vehicle. (J Exh. 32). Then Driver, at some point was elevated above the ground. (It is not clear from the Hearing Officer’s viewing of the video who or what caused the initial elevation). Grievant put driver’s hands behind the driver’s back. Within two seconds, Grievant slammed the driver to the ground on the pavement. However, immediately before Grievant took Driver down, it appears the driver stepped up on the floor board of the vehicle. The take down was from this elevated position. Contemporaneously, traffic continued to pass in the travel lane which was only a few feet from where Grievant employed the move that brought Driver down to the paved shoulder. Driver landed face/head first. (J Exh. 32; J Exh. 10 at 3; Testimonies of Deputy Bureau Director).

10. Grievant described his maneuver as a “take down from the rear.” The Agency’s Defensive Tactics Manual (DTM) identifies defensive tactics for sworn officers to utilize when effectuating an arrest or detention. The DTM does not identify a “take down from the rear” as such a tactic. (Testimonies of Lt. 1 and Grievant; J Exh. 35).

The rear take down as described by Grievant, jeopardized Grievant’s safety and the safety of others. In addition, Grievant’s slamming the driver to the paved ground failed to employ any tactics to minimize injuries to Driver. (J Exhs. 32 and 34; Testimony of Deputy Superintendent).

³ The Hearing Officer finds that the parties stipulated that Grievant had the authority to place Drive in investigative detention.

11. After Grievant's move, Driver sustained severe injuries to his jaw. By several reports he lost considerable blood. In addition, Driver suffered a lacerated lip and a broken tooth. Driver was then taken to Little Hospital and later transferred to Bigger Hospital. At Bigger Hospital, he underwent surgery due to the injuries.

12. Grievant had the driver pinned against the vehicle between the opened driver side door and the entrance to the vehicle's entrance prior to taking him to the ground. (J Exh. 32).

13. During the stop, Driver did not attack or injure Grievant and was not being violent toward Grievant. (J Exh. 32).

14. Driver did not have a weapon, informed Grievant of such, and did not verbally threaten Grievant. (J Exhs. 10 and 32; Testimony of Grievant).

15. Although other sworn officers were summoned to the scene of the incident, the February 6, 2017 incident described above was only witnessed by Grievant and Driver. (J Exh. 32).

16. Pursuant to the warrants issued, at the time of the incident, the driver was 5'8" and weighed 145 pounds. (J Exh. 10 at 1). Grievant was 6'2" and considerably larger in size than the driver. He weighed about 240 pounds then. (J Exh. 32; Testimony of Grievant).

17. At some point, after Grievant forced Driver to the ground, Driver's vehicle was searched. Reportedly a green plant like substance was found in a baggie in the back on a black sweatshirt. (J Exh. 10)

18. Grievant charged the driver with five (5) offenses. Those offenses were (i) resisting arrest under 18.2-479.1 of the Code of Virginia, as amended (a misdemeanor); (ii) possession of marijuana under 18.2-250.1 of the Code of Virginia, as amended (a misdemeanor); (iii) reckless driving for driving on the shoulder under 46.2-853 of the Code of Virginia, as amended (a misdemeanor); (iv) driving without a seat belt under 46.2-1094 of the Code of Virginia as amended (subject to a fine only or civil penalty); (v) no operator's license in possession under 46.2-104 of the Code of Virginia, as amended (subject to a \$10.00 fine only if convicted). (J Exh. 10 and Judicial Notice).

Hence, Grievant believed Driver had committed only traffic infractions/misdemeanor offenses. (J Exh. 10).

Complaint

19. Two days after the incident described above, the driver's mother filed a citizen's complaint asserting that Grievant employed unnecessary force. (J Exh. 9; Testimony of Area Supervisor).

Particularly the complaint states the following:

I would like to make a formal report of the abuse that my son, [Driver], suffered at the hand of [Grievant] on Monday, February 6th, 2017 in [City].

My son was pulled over by [Grievant] on an alleged traffic violation. At that time, my son was physically and mentally abused by the Officer. My son is currently in the [Big] Hospital, where he was transferred to from the [Little] Hospital. He had surgery yesterday, to repair his jawbone and chin which were broken in several places. Also, several teeth have been dislocated. At this time, besides the severe physical pain, my son, who is a fulltime forensic and chemistry major at [University], is also experiencing some emotional concern as a result of this traumatic and overly excessive abuse and extremely unnecessary action which he has suffered at the hands of [Grievant].

At this time, I am forced to advocate on his behalf due to his injuries, which has (sic) left him incapacitated and unable to speak.

(J Exh. 9 at 2).

20. The Area Supervisor received the complaint. A non-Internal Affairs investigation followed. This was so because upon receiving the complaint, reportedly the area supervisor was instructed that because the complainant was not an eye witness, the investigation would be conducted by the field. Agency Policy General Order ADM 12.00 permitted a field investigation. (J Exh. 4 at 7; J Exh. 28).

21. In this situation, once a complaint regarding unnecessary use of force is received the customary process for investigating the matter is as follows:

First, the conduct of the sworn officer who is the subject of the complaint is investigated by his immediate supervisor, the area sergeant. Then the area sergeant submits his report up the chain of command to his superior, the first sergeant. In the present case, the first sergeant's position was vacant. Hence, the matter was next sent to the Lt. of Safety Division for review. Once reviewed by the Lt. of Safety Division, the matter was submitted further up the chain of command to the division commander for review and a recommendation. In this case, it went to Division Commander I who held that position at the time the initial investigation started. Once the division commander completes his review, the matter is submitted to the Bureau Director of Field Operations for review and a determination/endorsement. The final decision whether the force was necessary or not is made by the Superintendent of Field Operations. (Testimony of Division Director I; J Exh. 27).

Non-Internal Affairs Investigation (Initial Investigation)

(i). Grievant's Area Supervisor's Investigative Report

22. Grievant's Area Supervisor commenced the initial investigation of the incident. Area Supervisor was not an eye witness to the incident. His investigation consisted of a review of the inaudible video from Grievant's patrol car. Grievant had reported that the microphone was inoperable because it was being charged. Area Supervisor also attempted to obtain a statement from the driver on February 6, 2017; the driver declined to speak with Area Supervisor. On February 6, 2017, Area Supervisor interviewed Grievant about the incident. Area Supervisor also obtained a written statement from Grievant on February 10 and 22, 2017, about the incident. (J Exh. 4).

23. Grievant's February 10 and 22, 2017 written statements indicated that the Driver's momentum took him to the ground. However, Grievant's written and oral statements on the date of the incident note that Grievant took the driver to the ground. (J Exh. 4 at 2; J Exh. 10 at 3).

In addition, Grievant's February 10 and 22, 2017 written statements noted that prior to others arriving on the scene, Driver was verbally confrontational and yelling. There is no mention of these acts in Grievant's February 6, 2017 criminal complaint. Also, Grievant's oral and written statements provided on the day of the incident do not mention Driver is profusely sweating and tensing up while still in the car. Also, Grievant does not state Driver is very nervous and his chest is rising and falling very fast while seated in the vehicle. However, in his later written statements, Grievant adds these comments. (J Exh. 4; J Exh. 5 at 3 and Exh. 10).

24. Moreover, Area Supervisor's investigation involved his obtaining statements from three additional sworn officers that arrived on the scene after Driver had sustained the injuries. Those officers were Lt. of Safety Division, Trooper II, and Sgt. II.

25. The statement of Lt. of Safety Division indicated that he was not an eye witness to the incident. He arrived after the fact to provide assistance if necessary. He left once Grievant's supervisor arrived at the scene. (J Exh. 4 at 5-6 and Exh. 6; Testimony of Lt. of Safety Division).

26. The statement of Sgt. II indicated that she also arrived on the scene after the incident occurred. She observed Driver was injured and took pictures of the Driver and the scene before the driver was taken to the hospital by EMS. Sgt. II stated that upon her arrival, Driver was combative and uncooperative and would not speak to law enforcement or EMS staff. (J Exh. 4 at 6-7 and Exh. 7).

27. The statement of Trooper II indicates that he arrived on the scene after the incident. Grievant informed Trooper II that he had smelled marijuana. Trooper II then stated he looked in Driver's car and observed a plastic baggie with a green plant like material sitting in the passenger seat on top of a black sweatshirt. (J Exh. 4 at 7 and Exh. 8).

28. The area supervisor concluded that Grievant had used minimal force during the arrest. Hence, in Area Supervisor's March 30, 2017 investigative report to his superior, Bureau Director, Area Supervisor recommended finding that Grievant used justified force. (J Exh. 4 at 9).

(ii). Division Commander I's Report

29. On April 4, 2017, Division Commander I also authored a report about the use of force complaint based on his investigation. Division Commander I recommended the Bureau Director find that Grievant's force was justified. Division Commander I made no inquiry regarding whether Grievant gave Driver an opportunity to comply with Grievant's directives. (J Exh. 12; Testimony of Division Commander I).

30. Division Commander I discussed the case with his superior, the Deputy Bureau Director. Due to his manifold responsibilities during the time of the investigation, Deputy Bureau Director did not thoroughly review the case. For example, prior to his initially endorsing Division Commander I's recommendation, Deputy Bureau Director acknowledged during his testimony that he had not had an opportunity to review the video in its entirety. Even so, Deputy Bureau Director initially endorsed a finding that the force was justified. Hence, the Hearing Officer finds that this finding was pre-mature. (Testimony of Deputy Bureau Director).

(iii). April 7, 2017 memorandum to Grievant

31. On or about April 7, 2017, Grievant received a memorandum dated April 7, 2017. Purportedly, Bureau Director endorsed the memorandum. The memorandum stated the following:

“After carefully reviewing the reports concerning the above case, and from additional information submitted. I concur with your supervisors that your actions were **Justified**.”

(J Exh. 13).

32. The Agency's General Order OPR 5.01 addresses “Use of Force.” This policy at ¶ 18 provides the following:

After reviewing the file, if the Bureau Director determines that the use of force was justified, he/she will notify the employee in writing of the decision and forward the file to the Internal Affairs Section. If the Bureau Director determines that the use of force was not justified, he/she will refer the matter to the appropriate Division Commander for appropriate follow-up.

(J Exh. 27 at 6 (General Order OPR 5.01 at 6).

33. Bureau Director did not endorse the memorandum dated April 7, 2017, referenced above in “Finding of Fact” #31. The initials appearing by his name on the memorandum were not his and he had not authorized a finding that Grievant's force was necessary. Moreover, at the time Bureau Director's initials were placed on the memorandum, he was on leave from the office. Further, as of the date the memorandum was signed Bureau Director had not reviewed the statements from the officers regarding what they had observed. Nor had he viewed the video of the incident. Accordingly, Bureau Director had not obtained or reviewed the relevant

information necessary to make a decision on whether to endorse or not endorse the division commander's recommendation. Thus, the memorandum received by Grievant stating that his conduct was justified was not sanctioned by the Bureau Director. Agency policy required Bureau Director's endorsement of the recommendation. (Testimony of Bureau Director).

The finding set forth in the April 7, 2017 memorandum is fatally defective.

Reopened Investigation Involving Internal Affairs

34. Deputy Superintendent has reviewed hundreds of claims involving misconduct by sworn officers, including unnecessary use of force claims. Regarding the present case, she reviewed the reports and video regarding Grievant's incident. After conducting her review, she found excessive force used. Deputy Superintendent based her finding on the video showing driver as non-violent and that Grievant's response was violent. She referred the matter back to her subordinates – Bureau Director and Deputy Bureau Director - for additional review and investigation. (J Exh. 14; J Exh. 16B; Testimony of Deputy Superintendent).

35. Upon reviewing the video in its entirety, the Deputy Bureau Director found the force used by Grievant to take the driver to the pavement was unnecessary and excessive. (Testimony of Deputy Bureau Director).

36. Bureau Director also reviewed the matter including the video. He also believed excessive force was used. Specifically, he found Driver was not combative, Grievant had Driver pinned against the vehicle, Grievant's take down was elevated, and Driver had no way to deflect or lessen the impact of Grievant taking Driver to the concrete ground. He concluded that Grievant employed excessive force. (Testimony of Bureau Director).

37. The matter was then forwarded for an investigation to the Internal Affairs Section of the Agency's Professional Standards Unit. Sgt. III conducted the investigation for Internal Affairs. (J Exh. 16A). Grievant was informed of the Internal Affairs investigation. (J Exh. 16F).

38. In conducting this investigation, Sgt. III interviewed Lt. of Safety Division. (J Exh. 16 A and D).

Sgt. III also interviewed Sgt. II. Among other things, she indicated that she arrived after the incident. She reported observing that upon her arrival, Driver was in handcuffs on the ground, blood was on the ground, and blood covered Driver's mouth and nose. Sgt. II described Driver as argumentative, pushing rescue personnel (who had been summoned to the scene once Grievant determined Driver was injured) off of him, cursing, and spitting blood towards her and rescue personnel. She took photographs of the scene and Driver. (J Exh. 16A at 2-3 and J Exh. 16E).

39. As part of his investigation, Sgt. III also interviewed Grievant. Grievant denied using excessive force. (J Exh. 16A at 3-5, and J Exh. 16H; Testimony of Grievant).

40. The Internal Affairs investigation obtained no statement from the driver. Area

Supervisor had attempted to interview driver on four occasions while the driver was in the hospital. The driver declined to be interviewed. A decision was made by Internal Affairs Supervision not to attempt to contact the driver for an interview. (J Exh. 16A at 5; J Exh. 17 at 1; Testimony of Area Supervisor).

41. As previously mentioned, the Bureau Director determined the force used by Grievant was not justified and the matter was sent to the Internal Affairs Unit for an investigation. At the conclusion of the Internal Affairs investigation, the report was sent to Grievant's then division commander, Division Commander II, pursuant to General Order 5.01 ¶ 18. Upon her review of the report and video, Division Commander II concluded that the use of force was unjustified. Hence, she recommended to her superior that Grievant receive a Group III Written Notice with a 10 day suspension. (J Exh. 17 at 1; Testimony of Division Commander II).

Discipline

42. The Agency then determined that discipline was appropriate under General Order ADM 12.02, ¶14, §b(27). This policy identifies "[t]he use of unnecessary force during an arrest/custody procedure" as a Group III offense. (J Exh. 30, at 7-10).

43. On January 5, 2018, Grievant's Division Commander issued Grievant a Group III Written Notice with a 10 day suspension. The notice described the nature of the offense as follows:

(Offense Code- Explained: Excessive Force used during an Arrest) [Grievant] used more force than reasonable while affecting the arrest of [the driver] resulting in injuries including broken jaw, lacerated lip, and injured tooth. The relative size difference between [Grievant] and [the driver], the clear emptiness of [the driver's] hands, and the established control over [the driver's] hands behind his back (able to be maintained throughout the entire take down to the ground) made the take down to the ground more force than reasonable under the circumstances.

(J Exh. 1; Testimony of Division Commander II).

Policies

44. The Agency's policy General Order OPR 5.01 addresses the use of force by an officer. This policy states that its purpose is "to establish guideline for use of force and uniform procedures for reporting and investigating use of force incidents." Moreover in pertinent part the policy states the following:

3. Sworn employees will **use only that force reasonably** necessary to effectively bring an incident under control, while protecting the life of the sworn employee or others. The sworn

employee is in the best position to determine which level of force or which technique is most appropriate in any given situation.

4. Sworn employees will use only that force **which is necessary and proper** to take a person into custody and safely detain and deliver to confinement or to disperse persons participating in an unlawful assembly. When the use of authorized less lethal weapons (issued night sticks, riot batons, ASP batons, taser, O.C. spray and patrol canine) is necessary, they will be used in a manner consistent with Department-approved training.

(J Exh. 27 at 1).

45. Moreover, the Agency's philosophy on Use of Force is set forth in its Defensive Tactics Manual. It states the following:

Philosophy concerning Use of Force

1. Always use only as a last resort
2. Verbal Intervention should be exhausted first
3. Use only the amount of force that is reasonably necessary
4. Always use good communication skills to reduce risk of injury
5. Control the situation with your mind, not your muscle!

(J Exh. 35, DTM Chapter 6).

46. The sworn employee's determination of force to use can be reviewed to determine if the force employed was reasonably necessary. (Testimony of Deputy Superintendent).

Prior Formal Disciplinary History

47. Grievant's disciplinary history consist of an inactive Group I Written Notice for behaving contrary to his training. (J Exh. 11 at 14).

48. This Group I Written Notice evolved from the Agency issuing Grievant a Group II Written Notice on August 21, 2014, for excessive/unnecessary force during an arrest. After appealing the decision to a Hearing Officer, the Hearing Officer determined that Grievant's was faced with a unique situation and the force Grievant utilized during the arrest was more akin to a "rough" arrest. That Hearing Officer concluded that Grievant's behavior was contrary to his training, rather than excessive use of force. In his decision issued on January 30, 2017, the Hearing Officer in the former matter reduced Grievant's Group II Written Notice to a Group I. (J Exh. 11at 13 – 15).

Although reduced to a Group I Written Notice, the offense that was the subject of the August 21, 2014 Group Notice involved a situation where Grievant was alleged to have used unnecessary force during an arrest. Grievant's "rough conduct" when effectuating an arrest was

the subject of the offense. Likewise, the current offense also involves the use of unnecessary force during a detention or arrest. That is, Grievant's actions or maneuvers employed during the arrest of Driver. Accordingly, in this respect the current offense is repetitive in nature to the 2014 offense. As such, under General Order ADM 12.02, the Agency is permitted to consider the inactive notice in determining the appropriate disciplinary action. (A Exh. 30 at 12 (General Order ADM 12.02 ¶15)

49. Under General Order ADM 12.02, a Group I Written Notice remains active for two years from its issuance date. (J Exh. 30 at 12).

50. Based on the evidence, Grievant's Group I Written Notice became inactive on or about August 21, 2016. Accordingly, on the date of the alleged offense that is the subject of the present case, the Group I Written Notice could not be considered to determine if Grievant had accumulated offenses. (J Exh. 30 at 12).

51. Inactive group notices may be reviewed to determine appropriate disciplinary action if the conduct or behavior is repeated. (Testimony of Division Commander II; J Exh. 30 at 12).

Defensive Tactics Manual

52. "The Defensive Tactics Manual (DTM) has been created to serve as a guide for members of [the Agency] and the defensive tactics training program. (J Exh. 35 at iii (DTM).

53. The prelude to the DTM states in pertinent part that the training program on defensive tactics "is designed to provide our sworn employees with a highly effective physical force option which, when used properly, will dramatically decrease the potential for injury to individuals resisting lawful orders or demonstrating aggressive behavior." (J Exh. 35 at iii (DTM).

54. Defensive tactics that Grievant was aware of by virtue of his being a defensive tactics instructor included but were not limited to, utilizing the door's V tactic to its fruition to limit the driver's movement, employing pain compliance techniques, and the arm bar escort takedown. (J Exh. 35 (DTM).

There were other tactics Grievant could have used during the incident with Driver on February 6, 2017, that would have caused less injury. (Testimonies of Deputy Superintendent, Division Commander I, Lt. I; J Exh. 35 (DTM)).

55. The DTM admonishes sworn officer to avoid using brute force. (J Exh. 35 at 33).

56. A guiding principal of the DTM is to cause as little injury to self and others when making an arrest. (J Exh. 35 at iii).

OTHER

56. A repair or replacement order had been submitted on January 27, 2017 requesting replacement of the microphone battery to the in-car video recorder. (J Exh. 12 at 2).

57. Evidence is insufficient to show Grievant gave the Driver reasonable time to comply with any instructions. (J Exh. 32; Testimonies of Deputy Superintendent and Division Commander I).
58. The resisting arrest charge was amended to obstructing justice. The Driver stipulated that the evidence was sufficient to convict on the obstructing justice charge. Driver was placed on probation. No finding of guilt was made as the court withheld making a finding in the matter. (Testimony of Sr. Assistant Commonwealth Attorney). All other charges were *nol prossed*.
59. Internal Affairs is a section in the Agency. Its primary duty is to conduct administrative investigations on personnel for various reasons, such as, but not limited to, use of unnecessary force, racial profiling. (Deputy Superintendent; J Exh. 30).
60. Grievant lawfully stopped the driver due to the traffic infraction. (J Exh. 32). Grievant was in investigative detention. However, the evidence is insufficient to establish that the driver was under arrest. (Testimony of Assistant Commonwealth Attorney).
61. A takedown maneuver does not usually result in broken bones. (Testimony of Deputy Superintendent; J Exh. 16B at 1).
62. The Agency/Commonwealth has received notice from the driver's attorney that the driver intends to file suit against the Commonwealth or its agent. The letter also states that the driver's medical bills exceed \$50,000.00. (J Exh. 26).
63. The driver reportedly was a senior at University. On the day he was arrested by Grievant, he was in route to his class at the university. (J Exhs. 9 and 26).
64. On the day of the incident Grievant had worked a 20 hour shift. (Testimony of Grievant).
65. Lt. I has been employed by the Agency for 25 years. He is a certified Defensive Tactics instructor. (Testimony of Lt. I).
66. Sgt. IV has been employed by the Agency for over 14 years. He has been a Defensive Tactics Instructor for nine years. (Testimony of Sgt. IV).

DETERMINATIONS AND OPINION

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." General Order 12.02(12)(a). Group II offenses "include acts and behavior of a more severe and/or repetitive nature and are such that an additional Group II offense should normally warrant removal." General Order 12.02(13)(a). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." General Order 12.02(14)(a).

General Order OPR 5.01 governs Use of Force. In pertinent part, this policy provides:

Sworn employees will use only that force reasonably necessary to effectively bring an incident under control, while protecting the life of the sworn employee or others. The sworn employee is in the best position to determine which level of force or which technique is most appropriate in any given situation.

Sworn employees will use only that force which is necessary and proper to take a person into custody and safely detain and deliver to confinement or to disperse persons participating in an unlawful assembly. When the use of authorized less lethal weapons (issued night sticks, riot batons, ASP batons, taser, O.C. spray and patrol canine) is necessary, they will be used in a manner consistent with Department-approved training.

The Agency asserts that Grievant used excessive force and issued Grievant a Group III Written Notice with a 10 day suspension. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the Group III Written Notice and did that behavior constitute misconduct?

The Agency contends that Grievant violated General Order OPR 5.01 on February 6, 2017, by using unnecessary force while arresting a driver (Driver). This policy provides in pertinent part the following:

3. Sworn employees will **use only that force reasonably** necessary to effectively bring an incident under control, while protecting the life of the sworn employee or others. The sworn employee is in the best position to determine which level of force or which technique is most appropriate in any given situation.

4. Sworn employees will use only that force **which is necessary and proper** to take a person into custody and safely detain and deliver to confinement or to disperse persons participating in an unlawful assembly. When the use of authorized less lethal weapons (issued night sticks, riot batons, ASP batons,

taser, O.C. spray and patrol canine) is necessary, they will be used in a manner consistent with Department-approved training.⁴

Next, the Hearing Officer considers the evidence to determine if the Agency has met its burden.

The video evidence showed Grievant driving on the interstate in very congested traffic, with it moving very slowly. A vehicle driving several car lengths in front of Grievant exited the right lane, drove on the shoulder, and then returned to the travel lane to circumvent some of the slow moving traffic. Grievant immediately pursued Driver for the infraction. About 15 to 20 seconds later, in response to Grievant's pursuit Driver pulled over on the right shoulder and stopped. The travel lane to the left of the shoulder lane was only a few feet from where Driver stopped his vehicle. Grievant stopped his patrol car immediately behind Driver's vehicle. Grievant exited the vehicle and quickly walked up to the driver side window of Driver's vehicle. While approaching the vehicle, Driver puts an item in the back seat area. Grievant reached the driver side window which is down. Grievant extended his head inside the vehicle.

The video illustrates that 12 seconds passed from the time Grievant arrived at the window, presumably speaks to Driver, and then opens Driver's door. The video is non-audible. Hence, the Hearing Officer was unable to determine what, if any, instructions Grievant gave to Driver, at what point during the 12 seconds any instructions were given, and whether reasonable time was given for Driver to comply with any instructions. Now back to the point where Grievant opened the Driver's door. During the next seven (7) seconds, the video shows that with force, Grievant removes Driver from his vehicle.⁵

Once Grievant removed Driver from his vehicle, the video shows Driver is elevated above the ground. It is unclear from the video how this initial elevation occurred. Moreover, Grievant quickly pins Driver between the opened driver side door and the entrance to the car. The agency refers to the location as the "V of the door." Pursuant to defensive tactics taught by the Agency to sworn officers, this maneuver can be used to its fruition to obtain control of a person being detained. Driver's position is such that his back is facing Grievant's front side. Grievant then places Driver's hands behind Driver's back. While Driver was in this position, it appears from the video that Driver steps up on the floorboard. Grievant states that this action by Driver was an attempt to escape. That said, at this point, Grievant has Driver's hands under control and behind his back. About two seconds pass and Grievant slams Driver to the concrete ground from Driver's elevated position. Driver's face/head hits the concrete ground. Grievant described his take down as a "take down from the rear."

During the incident, Driver did not assault the officer or attempt to do so. Also, the evidence demonstrates that Driver was weaponless and had informed Grievant of such.

⁴ General Order OPR 5.01 at 1 (emphasis added).

⁵ The Hearing Officer notes that it appears from the video that during the 12 seconds Grievant is at the driver's window, the driver moves his hands at least twice.

The Hearing Officer finds the take-down is fraught with problems. This is so especially considering that the Agency espouses the principle of minimizing injuries to officers and others, including subjects, when effectuating a detention or arrest. For one consideration, the video shows that the driver was not assaulting or attempting to assault Grievant. Accordingly, assuming there was resistance to the arrest/detention, it was in the words of the Deputy Superintendent “passive.” What is more, Grievant slammed Driver head/face first. Grievant had placed Driver’s hands and arms behind Driver’s back. And they were under Grievant’s control. Accordingly, Driver had no way to utilize his hands or arms to protect his face or lessen the impact of his face hitting concrete. Further, Grievant conducted the take down in proximity to moving traffic in the travel lane. This environment placed Grievant as well as Driver in an exceedingly precarious situation.

The Hearing Officer has also taken into consideration Grievant’s assertion that Driver went down due to his own body motion. The Hearing Officer has viewed the video several times and finds that it unequivocally shows Grievant slammed the driver to the ground.

Of note also, the evidence demonstrates that Grievant is trained to instruct others in defensive tactics and how to gain physical control of a non-complaint suspect. He therefore possesses more than basic defensive tactic skills. Yet, Grievant failed to employ an alternative tactic that would have been less likely to cause the serious injury Driver received upon Grievant’s slamming Driver to the concrete ground. The evidence showed alternative tactics included but were not necessarily limited to (i) utilizing balance points/peripheral nervous system tactics to control subjects; weaponless control/following through on using the V of the door tactic to control Driver; arm par escort; and (iv) placing Driver in the vehicle. What is also concerning is the evidence shows that as an instructor, Grievant is familiar with the many defensive tactics found in the Agency’s DTM. And nowhere in the DTM is a rear take down identified, discussed, or illustrated. Yet, Grievant identifies the maneuver he employed during the incident as just that. That said, the Hearing Officer is cognizant of language in General Order 5.01 indicating that “[t]he sworn officer is in the best position to determine which level of force or which technique is most appropriate in any given situation.” However, the discretion granted is not unbridled and subject to review. Upon review, the evidence clearly illustrates that Grievant’s maneuver was unjustified for reasons already stated here.

Accordingly, considering the totality of the circumstances, the Hearing Officer finds the force employed by Grievant was unjustified.

In her deliberation, the Hearing Officer has also examined Grievant’s conduct utilizing the four-part test set forth in *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973) *cert. denied sub nom. John v. Johnson* 414 US 1033 (1973). That test explained four factors to be considered to determine if an officer’s conduct rises to unjustified force. Those factors are mentioned here:

1. The need for application of force. Given the situation faced by the officer was there an actual need to use force to control the situation?

2. The relationship between that need and the amount of force used. Was the amount of force used appropriate to the resistance or situation?
3. The extent of the injuries inflicted. Type and or severity of the injury.
4. Whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm?

Using and applying this four part test, the Hearing Officer finds that prongs 2 and 3 of the test are most relevant. As previously mentioned, Driver did not assault or attempt to assault Grievant. Any resistance was passive. At the time Grievant slammed Driver to the concrete ground, Grievant had Driver's hands and arms behind Driver's back. Driver had no weapon. Driver was 5'8' and weighed 145 pounds whereas Grievant was 6'2' and considerably larger in size than Driver. What is more, due to the force used to take Driver down, Driver sustained a broken jaw, by reports he lost a considerable amount of blood, his lip was lacerated, and he sustained a broken tooth. Moreover, Driver was stopped by Grievant for a traffic infraction. Citations issued or warrants regarding the incident were either for traffic violations or misdemeanors. Utilizing the test above, the Hearing Officer finds the brute force used was in excess of what was warranted under the circumstances.

The Hearing Officer does not agree with Grievant's claim that the force was justified. The Hearing Officer does not agree. Regarding the force, the Hearing Officer notes discrepancies in Grievant's statements. For example, on the day of the incident, Grievant stated in the criminal complaint that Grievant took Driver down. Yet, in a later statement, Grievant avers that the Driver's momentum took him to the concrete ground. Grievant's latter statement is contradicted by the video.

Furthermore, the Hearing Officer considered testimony and statements of witnesses on behalf of Grievant. One of those witnesses was Lt. I, a certified Defensive Tactics Instructor; Another was Sgt. IV, also a defensive tactics instructor. Neither witness observed the incident on February 6, 2017, as it unfolded. They formed their opinion that Grievant's force was justified, in part, after they spoke to Grievant and got his account of the incident. No statement from Driver was available for their review. Moreover, both witness noted that the specific tactic Grievant used was not one found in the Agency's Defensive Tactics Manual. In addition, Lt. I identified at least one tactic Grievant could have employed during the incident that did not involve slamming Grievant to the ground. Sgt. IV also noted an alternative tactic - the arm bar takedown to the rear. Sgt. IV also stated that it did not appear to him that Grievant was fighting for his life. Grievant also presented Lt. of Safety Division. Similar to the other two witnesses discussed here, this witness did not observe the incident. Nor did he obtain any statement from Driver.

Having reviewed the evidence noted here, including the video, the Hearing Officer is not persuaded by the opinions of these witnesses. She also had an opportunity to observe the

demeanor of all witnesses. Having done so the Hearing Officer found Agency's witnesses credible who identified the force used as unjustified and articulated reasons for their finding. Those reasons included the passive resistance of Driver, the weaponless situation, the fact that Grievant had the driver's hands behind his back at the time Grievant took him down the ground, and the extent of the injuries.

Additionally, in support of his position, Grievant avers that he was initially cleared of the unjustified force claim. Grievant attempts to substantiate his argument by pointing to a memorandum dated April 4, 2017, and purportedly signed by the Bureau Director. This memorandum explicitly states the following:

I believe [Grievant] used the minimum force necessary to affect the arrest of [Driver]. I recommend [Grievant's] action be considered **Justified** and no further action be taken in this matter.

Bureau Director testified credibly that he was on leave from the office on the date of the memorandum referenced here and that he did not sign it nor authorized his subordinate to sign on his behalf. In fact, at the time this memorandum was written, Bureau Director testified he had not reviewed any reports on the incident. Nor had he viewed the video. Once Bureau Director reviewed the relevant information, he concluded that the force was not justified. Similarly, Deputy Bureau Director testified that prior to thoroughly reviewing the matter, he prematurely endorsed a finding that the force used was justified. But once he reviewed the reports and video he also determined the force used was not justified.

In sum, the Hearing Officer finds based on the evidence presented Grievant used unnecessary force and that the conduct violated General Order OPR 5.01.

B. Was the discipline consistent with policy and law?

The Hearing Officer now turns to the issue of whether the Agency disciplined Grievant in a manner consistent with policy and law.

General Order 12.02 states that the unnecessary use of force is a Group III Offense. The Agency issued Grievant a Group III Written Notice. In lieu of termination, the Agency suspended Grievant for 10 days. This punishment for a Group III Written Notice is authorized under General Order 12.02 ¶14(b)(27) and 12.02¶14(c).

Grievant argues that the Agency erred in considering his prior group notice because it was inactive. Under General Order 12.02 ¶15(c), the Agency may consider an inactive group notice in determining the appropriate disciplinary action if the conduct or behavior is repeated. Grievant's prior misconduct and group notice involved a similar circumstance which was reduced to a group I offense. In the former case, Grievant was involved in arresting a suspect for possession of marijuana. Even though the hearing officer in the former matter reduced the offense, he referred to the arrest conducted by Grievant as a "rough arrest." The former and present cases involve the force Grievant employed to effectuate a subject's arrest or detention. Due to the similar nature of the offenses in both matters, the Hearing Officer finds the Agency's

consideration of the prior group notice was appropriate.

Furthermore, even without considering the former group notice, Agency policy permits it to issue Grievant a Group III Written Notice. This is so, because even the first occurrence of using unnecessary force is a Group III offense. Accordingly, the Agency's discipline is consistent with policy and law regardless of whether the prior group notice was considered.

II. Mitigation.

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Equal Employment Dispute Resolution [“EEDR”].”⁶ EEDR’s *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”⁷ More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.⁸

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant engaged in the conduct described in the Group III Written Notice and the behavior was misconduct. Moreover as discussed above, the Agency’s discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable.

The Hearing Officer has considered the totality of circumstances and that the incident occurred within a short time frame. She carefully considered Grievant’s claim that the Agency is engaging in “Monday morning quarterbacking” and has not utilized progressive discipline. Further, as mentioned before, the Hearing Officer has considered the claim that the Agency unfairly considered Grievant’s inactive group notice.

⁶ Va. Code § 2.2-3005 and (c)(6)

⁷ *Rules for Conducting Grievance Hearings* VI(A)

⁸ *Rules for Conducting Grievance Hearings* VI(B)

The Hearing Officer also notes that Grievant is a Defensive Tactics instructor and as such has more than basic skills in employing tactics to gain control of subjects that may be resisting arrest. In addition, in this case the driver was not armed and he did not assault Grievant. The driver was not being violent, yet Grievant's take down was of such a nature. Moreover, the driver sustained serious injuries. Grievant's conduct has exposed the Agency and Commonwealth to liability. Further, the Agency has mitigated the discipline as Group III offenses normally warrant dismissal. Grievant's employment was not terminated. Moreover, Agency Policy permits the Agency to suspend the employee for up to 30 days in the case of a serious offense. Grievant was only suspended 10 day, although he could have received harsher discipline.

Having considered all the evidence whether specifically mentioned or not, the Hearing Officer finds the discipline reasonable.

DECISION

Hence for the reasons stated here, the Hearing Officer upholds the Agency's issuance of the Group III Written Notice with 10 days of suspension.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁹

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

Entered this 30th day of June, 2018.

Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate
Agency Representative
Grievant's Advocate
Grievant

⁹ Agencies must request and receive prior approval from EEDR before filing a notice of appeal.